INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
ARGUMENT	5
I. Petitioners Admitted Their Liability Before Trial	5
II. Petitioners Confuse the Law	6
III. Jury Instructions	8
IV. Respondent Properly Pled His Damages	9
V. Incorrect Statement by Petitioners	9
CONCLUSION	10
CERTIFICATE OF SERVICE	A-7

APPENDICES

A — Florida Rules of Civil Procedure, Rule 1.11. Defenses	A-1
B — Florida Rules of Civil Procedure, Rule 1.470. Exceptions Unnecessary	A-5

EXHIBIT

A — News Article Sued Upon	A-6

CITATIONS

Page

CASES:

Associated Press v. Walker, (1967) 388 U.S. 130.... 6

Beckley Newspapers Corp. v. Hanks, (1967) 389 U.S. 81 6

Brown v. Massachusetts, (1892) 144 U.S. 573, 580 3

Curtis Publishing Co. v. Butts, (1967) 388 U.S. 130 6

Edelman v. California, (1953) 344 U.S. 357 3

Michel v. Louisiana, (1955) 350 U.S. 91, 97 3

New York Times v. Sullivan, (1964) 376 U.S. 254 ..... 6, 7, 9

Rosenblatt v. Baer, (1966) 383 U.S. 75..... 8

St. Amant v. Thompson, (1968) 390 U.S. 727 6

Williams v. Georgia, (1955) 349 U.S. 375, 382-3 3

MISCELLANEOUS:

Florida Constitution — Article V, Section 4(2) 7

Rule 1.11. Defenses. *Florida Rules of Civil Procedure*, 1965 Revision, Effective January 1, 1966, Supreme Court of Florida, Opinion 178 So. 2d 15, Pages 16, 19 and 20 ..... 2, 3, Note 1

Rule 1.470. Exceptions Unnecessary. *Florida Rules of Civil Procedure*, 1966 Revision, Effective January 1, 1967, Supreme Court of Florida, Opinion 187 So. 2d 598, Page 626 ..... 8, Note 2

United States Constitution — First Amendment.... 4

United States Constitution — Fourteenth Amendment 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 1373

OCALA STAR-BANNER COMPANY,
a corporation, and LOYAL PHILLIPS,
Petitioners,

vs.

LEONARD DAMRON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Leonard Damron, prays that the Writ of Certiorari sought by Petitioners, Ocala Star-Banner Company, a corporation, and Loyal Phillips, to review a judgment of the District Court of Appeal First District, State of Florida, entered in the above entitled cause be denied.

The following symbols will be used:

"R" for trial clerk's certified record (Volume I)

"TT" for court reporter's separate volumes of trial transcript (Volumes II and III)

"DC" for record volume in the District Court of Appeal (Volume VI)

"SC" for the record in the Florida Supreme Court

OPINIONS BELOW

The opinion of the District Court of Appeal, First District, State of Florida, is reported at 221 So. 2d. 459. (Petitioners' Appendix A) The opinion of the Florida Supreme Court refusing to review said decision (SC 8) is not yet reported. (Petitioners' Appendix C)

JURISDICTION

The Petitioners have failed to timely raise a federal constitutional question in this cause to invoke the jurisdiction of this Court.

The complaint (R 1) in this cause was filed by Respondent on July 29, 1966, and the jury's verdict (R 18) returned on January 24, 1968.

An examination of the record and the transcript of the trial testimony show that no federal constitutional question was raised by the Petitioners until their motion for new trial (R 20-21) was filed on February 2, 1968.

The Petitioners did file a motion to dismiss (R 7) and a motion to strike (R 8) on August 23, 1966, but there were no allegations or statements therein showing specifically and with particularity that a federal constitutional question was raised.

The Petitioners' answer (R 10-12) is void of any defenses based on a federal constitutional question and the Petitioners presented no request for jury instructions raising such a question at the close of the evidence. (TT 285-298)

Rule 1.11[1] *Defenses. (b) How Presented, of the Florida Rules of Civil Procedure,* in effect from the time this cause was filed through the trial proceedings provides:

NOTE 1: Rule 1.11. Defenses. Florida Rules of Civil Procedure, 1965 Revision, Effective January 1, 1966, Supreme Court of Florida, Opinion 178 So. 2d 15, Pages 16, 19 and 20. Renumbered 1966 revision and is now Rule 1.140.

"Every defense, in law or fact, to a claim for relief in any pleading, shall be asserted in the responsive pleading thereto if one is required except that the following defenses may be made by motion at the option of the pleader: . . . (6) failure to state a cause of action . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. *The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not so stated shall be deemed to be waived.*" (Emphasis supplied)

(The full text of this rule is set forth in Appendix A.)

The federal question must be presented to the trial court at the point considered appropriate under state procedure. A state procedural rule which forbids the raising of a federal question at late stages in the case, or by other than the prescribed method has been recognized as a valid exercise of state power. *Williams v. Georgia*, 349 U.S. 375, 382-3; *Brown v. Massachusetts*, 144 U.S. 573, 580 (failure to raise question before verdict held to me fatal); *Edelman v. California*, 344 U.S. 357 (failure to raise issue at trial). Thus a state "may attach reasonable time limitations to the assertion of federal constitutional rights," and such limitations must be respected. *Michel v. Louisiana*, 350 U.S. 91, 97.

QUESTIONS PRESENTED

1. Does a libel judgment against newspaper Petitioners in favor of Respondent Mayor and candidate for County Tax Assessor (primarily covering damages for loss of election) deprive Petitioners of their Constitutional rights where the record contains no evidence of (or even consideration given to necessity for) actual malice as defined by this Court?

2. Does the State Court's instruction to a jury (affirmed by the District Court of Appeal) that it must return a libel verdict against Petitioners in favor of Respondent Mayor and candidate for County Tax Assesor without any regard for actual malice, as defined by this Court, deprive Petitioners of their Constitutional rights?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

Amendment XIV:

> ". . . (N) or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This action was originally filed by Respondent on July 29, 1966. The Petitioners first raised a federal constitutional question in their motion for new trial filed on February 2, 1968. (R 20-21) A motion to dismiss and a motion to strike (R 7-8) were filed by Petitioners on August 23, 1966. Both of these motions were completely void of any references to a federal constitutional question which is required to be stated by the Florida Rules of Civil Procedure in effect at the time these motions were filed. (Appendix A) The Petitioners' answer (R 10-12) did not raise any federal constitutional question and no jury instructions related to federal constitutional questions were requested.

Petitioners admitted their liability as to compensatory damages before trial as stated by the trial judge. (TT 274, lines 19 and 20) In their pleading Petitioners admitted in

Paragraph 1 of their answer (R 10-12) that they had published a defamatory article about the Respondent as alleged in the complaint. (R 1-6 and Petitioners' Apppendix F)

The trial court granted Respondent's motion to amend the complaint after the close of Respondent's case in chief to conform to the evidence (TT 143-146) and the Petitioners did not object. This amendment included Respondent's damages for embarrassment, mental anguish and upset.

ARGUMENT

I. Petitioners Admitted Their Liability

Before Trial

The trial court's granting of Respondent's motion for a directed verdict was with good cause and sound reason and not as Petitioners have represented on Page 14 of their brief.

The trial court, when ruling upon Respondent's motion for a directed verdict (TT 273-277) stated:

At TT 274, lines 19 and 20:

BY THE COURT: "Well, I think liability as to compensatory damages is admittted in this case."

At TT 276, line 5, Petitioners' trial attorney stated:

BY MR. AYRES: "He still has to prove his damages."

At TT 276, line 19:

BY THE COURT: "And I grant your motion to that extent."

At TT 277, lines 4 through 10:

BY MR. AYRES: "And in other words, I . . . I don't take it that your ruling comprehends an in-

struction by you to the jury that they must return a verdict for the Plaintiff because of the publication standing alone without more."

BY THE COURT: "No, they've still got to decide what damage he suffered."

BY MR. AYRES: "Yes Sir."

The trial court's statement that Petitioners admitted liability to compensatory damages was based on the fact that the liability of the Petitioners was admitted at the pretrial conference. However, no pretrial order was entered in this cause.

Paragraph 3 of the Respondent's complaint alleged the Petitioners published a defamatory article about the Respondent (R 1-6) (Petitioners' Appendix F) and Petitioners admitted this allegation in Paragraph 1 of their answer. (R 10-12)

II. Petitioners Confuse the Law

The Petitioners' argument in support of Certiorari attempts to confuse the law in *New York Times v. Sullivan* (1964) 376, U.S. 254, relating to public officials and the law in *Curtis Publishing Co. v. Butts and Associated Press v. Walker* (1967) 388 U.S. 130, relating to public figures. Since the *Butts* and *Walker* decision this Court has rendered other decisions affecting public officials, *Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81; *St. Amant v. Thompson* (1968) 390, U.S. 727, but has not commingled the rules laid down by this Court on public officials with the rules on public figures. This Court's specific pronouncement of the rule in *New York Times v. Sullivan* provides that a public official cannot recover damages for a libel relating to his official conduct unless he proves malice.

An examination of the article sued upon in this cause (Exhibit A) shows clearly that this article had no relationship to the official conduct of the Respondent.

This Court stated when this rule was pronounced in *New York Times v. Sullivan* that official conduct relates to the describing of performance of official duties, 376 U.S. 254, at Page 283, Note 23.

This is the basis upon which the District Court of Appeal First District, State of Florida, rendered its opinion. (DC 1, 221 So. 2d, 459, Petitioners' Appendix A) That Court merely held that the *New York Times v. Sullivan* rule does not apply to the facts in this case.

The Petitioners' appeal to the Florida Supreme Court was predicated upon the misconceived idea that the District Court of Appeal (supra) had initially construed a controlling provision of the Federal Constitution. (See Petitioners' Notice of Appeal, SC 1) Such a construction would have been a ground for the Florida Supreme Court's taking jurisdiction. (See *Section 4 (2) Article V, Constitution of Flolrida)*

Petitioners' brief to the Florida Supreme Court was written in the same manner as the brief here for Certiorari, attempting to indicate some question did exist for jurisdiction.

The Florida Supreme Court denied Respondent's motion to dismiss for want of jurisdiction initially when only the Petitioners' appellate brief and the oral argument on the motion to dismiss were before the court.

After Respondent's brief was filed in the Florida Supreme Court, and oral argument, the Florida Supreme Court, on closer examination, dismissed Petitioners' appeal to that court upon finding that Petitioners' appeal was not well founded, ruling it had no jurisdiction since it was obvious there had been no construction of the Federal Constitution as alleged by the Petitioners. (SC 8)

The Respondent here is clearly a public official as defined by this Court in *Rosenblatt v. Baer* (1966) 383 U.S. 75, and not a public figure. The libel sued upon here is outside the scope of the *New York Times v. Sullivan* and subsequent related public official libel action decisions rendered by this Court. The rule laid down in *New York Times v. Sullivan* has no application to this cause because the libel here does not relate to official conduct.

Therefore, Petitioners' Questions Presented No. 1 and argument thereon that the rule requiring malice must be alleged and proved does not apply to this cause.

Petitioners further confuse the question by citing other authorities which have no relationship to this cause under discussion. This cause is simply that the libel of public official on a matter unrelated to his official conduct does not come within the rule laid down in *New York Times v. Sullivan.*

III. Jury Instructions

The Petitioners in their Questions Presented No. 2 have inquired as to whether or not a state court must instruct a jury as to actual malice where a libel action relates to a public official, yet no where in Petitioners' Statement of the Case or Petitioners' argument or Petitioners' assignment of error has there been shown that any request was ever made for such a jury instruction by the Petitioners. *Rule 1.470,*[2] *Exceptions Unnecessary (b) Instruction to Jury, of the Florida Rules of Civil Procedure* in effect when this cause was tried provides:

> "No party may assign as error the giving of any charge unless he objects thereto at such time *or the failure to*

NOTE 2: Rule 1.470. Exceptions Unnecessary. Florida Rules of Civil Procedure, 1966 Revision, Effective January 1, 1967, Supreme Court of Florida, Opinion 187 So. 2d 598, Page 626.

give any charge unless he requested the same." (Emphasis supplied)

(The full text of this rule is set forth in Appendix B.)

The Petitioners' inquiry, therefore, is without merit since Petitioners made no request for a jury instruction upon which they raise their Questions Presented No. 2.

IV. Respondent Properly Pled His Damages

Contrary to argument of Petitioners, the Respondent did properly plead his damages in his complaint which were directed to his public office.

This Court in *New York Times v. Sullivan*, 376 U.S. 254, 268, stated:

> "The question before us is whether this *rule of liability* as applied to an action brought by a public official against critics of his official conduct abridges the freedom of speech . . ." (Emphasis supplied)

This rule being one on the question of privilege from liability cannot be used as a bar to recover damages incident to a libel action which is outside of the rule, nor can it be argued that if an action does exist in the first instance it can be barred by the allegations and proof for damages which naturally flow from the Petitioners' act.

The Petitioners, in answering Respondent's complaint (R 1) Paragraph 3, admitted in their answer (R 10-12) that they had published a defamatory article about the Respondent and directed their answer in an endeavor to mitigate damages, thus the only issue to try was one for damages. (See argument on Petitioners Admit Liability Before Trial, supra)

V. Incorrect Statement by Petitioners

Petitioners have stated on Page 14 of their brief that the attorney for the Respondent understood how the jury

verdict was determined. Although this is irrelevant, it is pointed out that Respondent's attorney was also the attorney present at the Supreme Court of Florida at the time of oral argument, and he has no recollection of having made such a statement nor could he make such a statement since he has had no direct or indirect contact with the jury in this cause to determine how they arrived at their verdict.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WALLACE DUNN
1 E. Silver Springs Boulevard
Ocala, Florida 32670
Attorney for Respondent

APPENDIX A
FLORIDA RULES OF CIVIL PROCEDURE
1965 Revision

Effective January 1, 1966
Supreme Court of Florida
Opinion 178 So. 2d 15
Rule 1.11 at pages 16, 19 and 20

RULE 1.11. DEFENSES.

(a) *When Presented.* A defendant shall serve his answer within twenty days after service of original process and the original pleading upon him, or not later than the date fixed in a notice by publication, which date shall be not less than twenty-eight nor more than sixty days after the first publication of the notice. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his answer to a counterclaim within twenty days after service of the counterclaim, or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule (except a motion for judgment on the pleadings) alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after service of the more definite statement.

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the respon-

NOTE: **Although the Florida Rules of Civil Procedure have been amended since January 1966, Rule 1.11 (b) has not been amended except it is now re-numbered as Rule 1.140 Defenses, in re Florida Rules of Civil Procedure 1966 Revision, 187 So. 2d 598, Page 605.**

sive pleading thereto if one is required; except that the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, (7) failure to join indispensable parties. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. *The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not so stated shall be deemed to be waived* except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

(c) *Motion for Judgment or Decree on the Pleadings.* After the pleadings are closed, but within such time as not to delay the trial any party may move for judgment or decree on the pleadings.

(d) *Preliminary Hearings.* The defenses 1 to 7, subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment or decree mentioned in subdivision (c) of this Rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof shall be deferred until the trial.

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or am-

biguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of Defenses.* A party who makes a motion under this rule may join with the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) *Waiver of Defenses.* A party shall be deemed to have waived all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a cause of action, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2)

that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter. See Rule 1.39. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 1.15(b) in the light of any evidence that may have been received.

Committee Note: **Substantially the same as Common Law Rule 13 and Equity Rule 33. Subsection (b) is amended to restore demurrer practice to the extent of requiring the specific grounds of defensive motions to be stated.**

(Emphasis supplied)

APPENDIX B
FLORIDA RULES OF CIVIL PROCEDURE
1966 Revision
Effective January 1, 1967
Supreme Court of Florida
Opinion 187 So. 2d 598
Rule 1.470 at Page 626

RULE 1.470. EXCEPTIONS UNNECESSARY.

(a) *Adverse Ruling.* For appellate purposes no exception shall be necessary to any adverse ruling, order, instruction or thing whatsoever said or done at the trial or prior thereto or after verdict, which was said or done after objection made and considered by the trial court and which affected the substantial rights of the party complaining and which is assigned as error.

(b) *Instruction to Jury.* No later than at the close of the evidence, the parties shall file written requests that the court charge the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the charges to be given. At such conference all objections shall be made and ruled upon and the court shall inform counsel of such general charges as it will give. *No party may assign as error the giving of any charge unless he objects thereto at such time or the failure to give any charge unless he requested the same.* The court shall charge the jury after the arguments are completed.

(c) *Orders on New Trial, Directed Verdicts, etc.* It shall not be necessary to object or except to any order granting or denying motions for new trials, directed verdicts or judgments non obstante veredicto or in arrest of judgment to entitle the party against whom such ruling is made to have the same reviewed by an appellate court.

Committee Note: **Common Law Rule 39.**

(Emphasis supplied)

EXHIBIT A

Monday, April 18, 1966 Ocala Star-Banner

DAMRON CASE PASSED OVER TO NEXT U.S. COURT TERM

INGLIS — A case charging local garage owner Leonard Damron with perjury was passed over for the present term of Federal Court after Damron entered a not guilty plea before Federal Judge Harrold Carswell in Gainesville.

Darmon was indicted by a Federal grand jury and charged with perjury in a 1964 civil case which resulted in damages of $65,000 being awarded to a Yankeetown couple.

Mrs. Gail Finley alleged that Levy County Deputy Sammy Cason slammed on brakes causing her to injure her neck in October of 1962.

Cason and Deputy Walter Beckham went to Yankeetown with a warrant for the arrest of Mrs. Jean Rich Sill, who was allegedly in the Izaac Walton Lodge.

According to officials, the Finleys interfered with the officers, were arrested and charged with interfering with arrest.

A conviction obtained in County Court has been upheld through appeals by the Florida State Supreme Court.

The civil suit which followed was filed under an old, little-used federal statute in which the Finleys charged former sheriff J. W. Turner and Cason with a violaion of their civil rights.

Damron testified that he had seen Mrs. Finley in a neck brace in late 1957 or early 1958 several years prior to the incident, but numerous other witnesses, summoned by the plaintiff, gave testimony, saying that Mrs. Finley had not previously worn a brace.

Damron was released on $2,000 bond, following his arrest by federal marshals Jan. 27.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 33, I certify that I have this April ....., 1970, deposited in the United States mail box at Ocala, Florida, with first-class postage prepaid, envelopes containing copies of the foregoing Brief for Respondent in Opposition and appendices addressed to (1) Harold B. Wahl, Attorney for Petitioners, Loftin and Wahl, 414 Florida Title Building, Jacksonville, Florida 32202; (2) Hon. Sid J. White, Clerk, Supreme Court of Florida, Tallahassee, Florida 32304; and (3) Hon. Raymond E. Rhodes, Clerk, Florida District Court of Appeals, First District, Tallahassee, Florida 32304; and that these are all the parties required to be served.

.....

WALLACE DUNN, *Attorney for Respondent*
1 E. Silver Springs Boulevard
Ocala, Florida 32670